Court No. 2

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

A.O. No. 239 of 2004

1.Smt.Meena Variyal
W/o late Sri S.C.Variyal,
2.Smt.Kunti alias Kamla
W/o late Sri Shiv Dutt Variyal,
Both residents of Village-Vari, Patti-Pataliya, Tehsil Dhari, District-Nainital. ..... Claimants/Appellants.

Versus

1.M/s Apace Saving & Mutual Benefits India Ltd., through its Managing director, R/o 201/202 Vinay Palace, Ashoka Marg, P.S.-Lucknow, Uttar Pradesh.
2.The Oriental Insurance Company Ltd., through its Divisional Manager, Divisional Office, Nainital Road, Haldwani, District-Nainital.

..... Opp.parties/Respondents.

Sri Sudhir Singh, learned counsel for the appellants,
Sri D.S.Patni, learned counsel for the respondent No. 2.

Dated: 27th Aug., 2004

Hon'ble P.C.Verma,J.
Hon'ble B.S.Verma,J.

This appeal has been preferred by the claimants/appellants under Section 173 of the Motor Vehicles Act, 1988 against the judgment and order dated 24.04.2004 passed by the Motor Accident Claims Tribunal/District Judge, Nainital in Motor Accident Claim Petition No. 29 of 2000, Smt.Meena Variyal & another versus M/s Apace Saving & Mutual Benefits India Ltd. & another, by which the Tribunal has allowed the claim petition filed by the claimants for a sum of Rs. 7,20,000/- alongwith interest at the rate of 9% per annum against the Opp.party No.1-owner of the vehicle in question.

2- Brief facts giving rise to this appeal are that on 14.6.1999 deceased Suresh Chandra Variyal was returning from Kichha to Haldwani after doing his work alongwith his colleague Sri Mahmood Hasan through Maruti Car No. UP 78/R-4248. When he reached near Halduchaur at about 11.30 p.m., the said car dashed with a tree. At the time of accident Sri Mahmood Hasan was driving it rashly and negligently. In the said accident Deceased Suresh Chandra Variyal sustained grievous injuries and due to said injuries he died after some time. The deceased was getting Rs. 9000/- per month as salary from the oppositre party No.1. The claimants, who are dependents of the deceased, filed the claim petition for compensation to the tune of Rs. 15 lakh.

3- The Opp. Party No.1-M/s Apace Saving & Mutual Benefits India Ltd. did not contest the claim petition despite service and the case was proceeded exparte against it before the Tribunal. The Opp.party No.2-Oriental Insurance Company Ltd. filed its written statement and alleged that there has been collusion in between the driver and the owner of the vehicle and the owner of the Maruti Car has not been made party. It was also alleged that the deceased himself was driving the vehicle. So he is not entitled to get any relief and also the Insurance Company is not liable to pay the compensation unless and until the documents relating to the vehicle in question are not produced. The Tribunal, on the pleadings of the parties, framed necessary issues and after recording evidence of the parties allowed the claim petition against the Opp.party No.1-owner of the vehicle in question accordingly against which the proceedings were going on exparte. Feeling aggrieved, the claimant/petitioners have come up in this appeal.

4- The learned counsel for the claimants/appellants contended that the impugned judgment and award so far as it relates to awarding compensation against the owner of the alleged vehicle is contrary to law laid down in the case of *National Insurance Company Limited versus Swaran Singh and others*, reported in (2004) 3, Supreme Court Cases, page 297. He further contended that the Tribunal had failed to consider that if the owner/insured is found liable for payment of compensation, the insurer/Insurance Company must pay the amount to the claimants and can recover the same from the owner/insured.

5- We have gone through the entire material on record and perused the impugned judgment. It is a dispute between the insured and insurer as to whether the compensation is to be paid by the Insurance Company or by the insured. Since the vehicle in question was insured, therefore the Company has to pay the amount and if there was breach of policy conditions, the Insurance Company may recover the amount from the insured in accordance with law as held by the Apex Court *in* ***2001 AIR SCW 1340, New India Assurance Company, Shimla versus Kamla and others,*** which has been affirmed by the larger Bench subsequently in the case ***National Insurance Company Limited versus Swaran Singh and others,*** reported in ***(2004) 3, Supreme Court Cases, page 297.*** In the judgment of Swaran Singh's case (supra), the Apex Court in Para 110 gave its findings to the various issues as raised in the case as follows:-

> (i) *Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this*

paramount subject and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurance is entitled to raise a defence in a claim petition filed under Section 163 A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149 (2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the drive, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and deriver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at the conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.

6- Following the ratio of the Apex Court, we have held in so many cases that it is not open to Oriental Insurance Company to avoid its liability under the Act. The Tribunal had erred in passing a decree against the owner and not against the Insurance Company. Further merely non-filing of the driving licence does not absolve the said Insurance Company from its liability to pay the compensation to the dependents of the deceased which are the ultimate sufferers and need quick remedy of compensation. The Tribunal ought to have fixed the liability upon the insurer giving it recoverable rights under the provisions of the Act.

7- The appeal is disposed of accordingly. The Opp. Party No.2-Oriental Insurance Company shall pay the amount awarded to the claimants alongwith interest and may take recourse to recover it from the insured in accordance with the directions given by the Apex Court in the aforementioned case.

(B.S.Verma,J.) **(P.C.Verma,J.)**

P.Singh